

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JENNIFER ANN HALLMAN and MATTHEW  
ALLEN JOHNSTONE,

UNPUBLISHED  
August 11, 2005

Plaintiffs-Appellants,

v

FANNY A. DELA CRUZ, M.D., WEST  
BLOOMFIELD PLASTIC SURGERY CENTER,  
P.C., and MICHIGAN LASERGRAFT CENTER,  
P.C.,

No. 253363  
Oakland Circuit Court  
LC No. 02-043568-NH

Defendants-Appellees.

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Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs Jennifer Hallman and Matthew Johnstone<sup>1</sup> sued defendants Fanny Dela Cruz, M.D.; West Bloomfield Plastic Surgery Center, P.C.; and Michigan Lasergraft Center, P.C.;<sup>2</sup> for medical malpractice after Hallman developed complications from breast augmentation surgery. Hallman appeals by leave granted from the trial court's orders striking Hallman's expert witness after a motion in limine and denying Hallman's motion for reconsideration. We reverse and remand. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

In January 2000, Dela Cruz performed breast augmentation surgery on Hallman using a transumbilical breast augmentation (TUBA) procedure, which involves making an incision in the umbilical area and creating a tunnel to reach the breast area where implants are inserted and then filled with saline. Dela Cruz performed the initial consultation with Hallman at Michigan Lasergraft Center, P.C., and performed much of the follow-up care at West Bloomfield Plastic Surgery Center, P.C.

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<sup>1</sup> Because Johnstone's claims are derivative of Hallman's, this opinion will refer only to Hallman as the plaintiff.

<sup>2</sup> Because the claims are based directly on the conduct of Dela Cruz, this opinion will refer only to Dela Cruz as the defendant.

Complications, such as numbness and rippling of the right breast tissue, arose soon after the procedure. Dela Cruz performed a second surgery using an inframammary incision to replace the implant. When the same complications arose again, Hallman consulted with a different plastic surgeon who performed a third surgery to correct the problems. During this surgery, it was discovered that the right implant was located in the subcutaneous plane, which is just below the skin and above the breast gland, rather than in the subglandular plane, which is below the breast gland.

Hallman's complaint alleges that Dela Cruz was liable for negligence and malpractice in the following particulars:

- a. Performing bilateral transumbilical retroglandular augmentation mammoplasty in such a manner that the right breast implant was placed in an improper plane between the skin and breast tissue;
- b. Failing to use an endoscope to verify the placement of the implant during the surgical procedure;
- c. Failing to provide proper follow up treatment despite repeated complaints by Plaintiff Jennifer Ann Hallman regarding loss of sensation and improper appearance;
- d. Failing to rectify the improper placement of the right breast implant; and
- e. Other acts of negligence that may be disclosed through the course of discovery.

Hallman offered expert witness testimony by Richard Ehrlichman, M.D., who is board certified in the field of plastic surgery. Ehrlichman is also active in the clinical practice of plastic surgery and, along with a partner, runs the residence plastic surgical clinic at Beth Israel Hospital, which is a teaching hospital at Harvard Medical School. Ehrlichman has never performed or assisted in a TUBA procedure for breast augmentation. Instead, Ehrlichman uses the inframammary technique.

Ehrlichman provided an affidavit, stating:

Regardless of the surgical technique used to insert a breast implant, the applicable standard of care required that the breast implant be inserted directly under the breast tissue or beneath the chest wall muscle.

Regardless of the surgical technique used to insert a breast implant, placement of the breast implant between the skin and breast tissue is inappropriate and in violation of the applicable standard of care for breast augmentation surgery.

Regardless of the surgical technique used to insert a breast implant, the applicable standard of care required that the position of the breast implant be verified during the course of the procedure to avoid the placement of the implant in an improper plane.

Regardless of the surgical technique used to insert a breast implant, the applicable standard of care required proper follow up treatment to detect the fact that the right breast implant was inserted in the improper plane and that the improper placement of the right breast implant be rectified in a timely fashion.

Dela Cruz filed a motion in limine requesting that the trial court strike Dr. Ehrlichman as an expert because he had never performed or taught on the TUBA procedure, and because the complaint allegedly only related to the initial surgery. The trial court granted Dela Cruz' motion and struck Ehrlichman as an expert, finding that Hallman had not shown that he was sufficiently familiar with the procedures and surgery at issue to express an expert opinion on the standard of care applicable to this case.

## II. Expert Witness Testimony

### A. Standard Of Review

We review the trial court's decision on whether a witness is qualified to give an expert opinion for an abuse of discretion.<sup>3</sup>

### B. MRE 702 And MCL 600.2169

In a medical malpractice case, an expert witness must fulfill the requirements of both MRE 702 and MCL 600.2169.<sup>4</sup> "Under MRE 702, an expert may be qualified by virtue of his knowledge, skill, experience, training, or education."<sup>5</sup> Further, "Michigan endorses a broad application of these requirements in qualifying an expert."<sup>6</sup> "[A]n opposing party's disagreement with an expert's opinion or interpretation of facts, and gaps in expertise, are matters of the weight to be accorded to the testimony, not its admissibility."<sup>7</sup>

MCL 600.2169(1) requires that an expert witness possess the same specialty as that of the defendant physician during the course of the alleged malpractice.<sup>8</sup> If the defendant is board certified, so too must the expert witness be board certified in the area of specialty that is the basis for the action.<sup>9</sup> Further, the expert witness must devote a majority of his professional time to the active clinical practice of the same health profession.<sup>10</sup> There is no statutory requirement, and

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<sup>3</sup> *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002).

<sup>4</sup> *Id.* at 217.

<sup>5</sup> *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 400; 628 NW2d 86 (2001).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 401.

<sup>8</sup> *Hamilton v Kuligowski*, 261 Mich App 608, 610-611; 684 NW2d 366 (2004).

<sup>9</sup> MCL 600.2169(1)(a).

<sup>10</sup> MCL 600.2169(1)(b).

this Court has refused to require more than the statute, that any sort of sub-specialty requirement be imposed.<sup>11</sup>

There is no dispute in this case that Ehrlichman meets the requirement of MCL 600.2169(1). Ehrlichman is board certified in the same specialty of plastic surgery as Dela Cruz. He has also devoted a majority of his professional time to the active clinical practice of or instruction of students in that specialty of plastic surgery. The dispute in this case concerns whether Ehrlichman can testify as to the standard of care for the TUBA procedure when he has not performed that procedure, and whether the initial TUBA procedure is the only surgical procedure that serves as the basis for the alleged malpractice.

The complaint states that Hallman presented herself to Dela Cruz on or about January 15, 2000 for the purposes of receiving care, treatment, and advice regarding breast augmentation. The complaint also alleges that in the transumbilical procedure the right implant was placed in the improper plane, and that Dela Cruz failed to provide the proper follow-up treatment to rectify the improper placement. The follow-up treatment and attempt to rectify the alleged improper placement included the use of the inframammary technique during the revision surgery that Dela Cruz performed. Because the complaint plainly refers to follow-up treatment and the failure to rectify the alleged improper placement, it is not limited solely to the TUBA procedure done in January 2000. Additionally, Ehrlichman's second affidavit stated that regardless of the surgical technique used, the standard of care for placement of a breast implant remains the same, and it is inappropriate to place the implant in a subcutaneous position.

As stated earlier, there is no dispute that Ehrlichman meets the statutory requirements of MCL 600.2169(1). Further, his knowledge, skill, experience, and training would assist the trier of fact concerning the breast augmentation and the follow-up care provided. The differences of opinion between Dela Cruz and Hallman, as well as possible gaps in expertise concerning one of the surgical techniques used, are matters concerning the weight of Ehrlichman's testimony, not its admissibility. Therefore, we hold that the trial court abused its discretion by precluding Ehrlichman as an expert witness based solely on the TUBA procedure, when there was a whole series of appointments and several procedures related to the conduct alleged in the complaint. Ehrlichman meets the requirements of MCL 600.2169(1) and also qualifies under Michigan's broad application of the MRE 702 requirements.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald

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<sup>11</sup> *Hamilton, supra* at 611.